



**Australian
Privacy
Foundation**

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15 November 2010

Dr Mukesh Haikerwal, National Clinical Lead, NEHTA

cc. Andrew Howard, CIO, NEHTA
Bettina McMahon, Head of Policy and Privacy, NEHTA
Melanie Goldwater, Privacy Manager, NEHTA
Catherine Bramwell, DoHA

Dear Mukesh

Re: PCEHR – Process Matters

The Roundtable on Wednesday 10 November was, from the advocacy perspective, a valuable event. Information was presented at the meeting. Considerable interaction occurred, some of it was responded to, some of it appeared to be assimilated, and all of it, we trust, was recorded for playback shortly.

This letter identifies process aspects that we consider to be critical to ongoing progress. A separate letter addresses design issues.

We note that Peter Fleming's response to the APF, dated 12 November, declared "NEHTA's commitment to a methodical and cumulative approach to engagement with privacy advocacy organizations", and what we understand to be in-principle agreement with the APF's Policy Statement on Consultations, further copy attached.

The attachment requests specific commitments from NEHTA, in the form of positive and explicit responses to each matter, as a means of underpinning an effective consultative process in line with the APF's Policy Statement.

Thank you for your consideration.

Yours sincerely

Roger Clarke
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Australian Privacy Foundation

The PCEHR Consultation

Process Matters

General

1. No documentation or copies of slide-sets was provided in advance of the Roundtable, nor at the Roundtable, nor in the days immediately following it. The list below therefore depends on on-the-fly note-taking during the rapid presentations. That is not a good way to achieve effective consultation.
2. During the self-introductions, there were multiple expressions of concerns about:
 - real engagement
 - proper governance
 - benefits for consumers not just administration

Several mentions were made of aboriginal health services being undermined by limited infrastructure and late engagement, and of the challenges involved to privacy and confidentiality.

3. APF expressed four first-round areas of concern:
 - 'personally-controlled' means what?
 - the role of consent
 - the missing privacy component of the legislative package
 - the Minister has committed to PIAs, but when do they start, and what process will be used?

Deep-Level Consultation Arrangements

4. It was stated that Workshops have already been held on specific aspects, under NDAs. APF was not aware of them, and was not invited to any such events.
5. The APF expresses serious concern about the existence of multi-level consultation arrangements, and the exclusion of relevant civil society from some of those levels.
6. The APF draws to attention its longstanding policy in relation to confidentiality, and its in-principle agreement that a proportion of the information that arises in deep-level consultations are by their nature in-confidence. It would welcome such a statement being applied to such events.
7. It is essential that:
 - multi-tier consultation arrangements be known to relevant civil society
 - relevant civil society organisations be able to participate in relevant deep-layer workshops
 - the APF in particular be engaged in relevant deep-layer workshops

Personal Choice / Opt-In

8. It was stated that the scheme was, at the Minister's directions, opt-in / consent-based.

This is crucial to public trust. There will be strong motivations for patients with chronic and complex conditions to opt-in, because they stand to gain from the scheme. The motivations for other categories of patients to opt-in will be lower, and – at least until the credibility of quality, security and privacy assurances are established – many people will rationally prefer to remain outside the scheme.

9. It is essential that:
 - an explicit, written undertaking be provided that the scheme will be, and will remain, opt-in / consent-based
 - to the extent practicable, this will be entrenched in legal, organisational and technical designs

- the legal, organisational and technical designs will not be devised in order to leave open the option of switching to a compulsory scheme
- to the extent practicable, there will be no penalties for not opting in
- the legal, organisational and technical designs will not be devised in order to create or exacerbate penalties for not opting in

Governance Structures

10. It was stated that there is to be "rigorous governance and oversight to maintain privacy", but also that the specifics have not been decided yet.

11. APF expresses concern in the following areas:

- current privacy laws are grossly inadequate. In particular:
 - they are general rather than specific
 - they provide almost no sanctions
 - where regulators exist, their powers are extremely limited
 - where regulators exist, they are seriously under-resourced
 - the Australian Privacy Commissioner and OAIC are completely inadequate to the task, and a much more powerful and specific regulator is necessary
- the enabling legislation for eHealth has to date included no privacy protections
- despite the explicit commitments given by the Minister, the APF is not aware of any PIA processes having been commenced, even on the health identifier system
- no proposal for governance structures has yet been brought forward
- the Roundtables were declared by NEHTA to not be part of the consultation process
- no mechanism was proposed whereby governance structures would be formed
- no commitment was given that civil society would be consulted in the development of the governance structures

12. APF reiterates the specific proposals it put forward at the Roundtable, as follows:

- a Consumer Steering Committee, reporting to the NEHTA Board
- a Consumer Reference Group, beneath the Steering Committee
- very broad and open membership of the Reference Group
- sufficiently large membership of the Steering Committee that all perspectives have a voice
- formal requirements that the Steering Committee represent the views of the Reference Group i.e. under no circumstances can the Steering Committee be appointees with independent standing, acting as principals rather than as agents of the Reference Group

Governance Processes

13. Mentions of 'governance' were primarily focussed on institutions, representation and relationships.

By itself, governance structure does not provide protection.

14. It is essential that:

- governance structures be accompanied by processes
- governance processes be specified at a sufficient level of detail
- governance processes be mandatory, and non-compliance be an offence

Interplay Between Federal and State Laws

15. It is understood that (some?) States and Territories wish to retain their existing privacy laws as they affect the health care sector.

16. It is essential that a set of principles be established, reflecting the privacy-relevant undertakings given in relation to the system, which all States and Territories agree to ensure are implemented in their laws.

Policy Position
eHealth Data and Health Identifiers

28 August 2009

<http://www.privacy.org.au/Papers/eHealth-Policy-090828.pdf>

This document builds on the APF's submissions over the last two decades, and particularly during the last three years, in order to consolidate APF's policy position. It presents a concise statement of general Principles and specific Criteria to support the assessment of proposals for eHealth initiatives and eHealth regulatory measures.

The first page contains headlines only, and the subsequent pages provide further explanation.

General Principles

- 1 **Health Care Must Be Universally Accessible**
- 2 **The Health Care Sector is by its Nature Dispersed**
- 3 **Personal Health Care Data is Inherently Sensitive**
- 4 **The Primary Purpose of Personal Health Care Data is Personal Health Care**
- 5 **Other Purposes of Personal Health Care Data are Secondary, or Tertiary**
- 6 **Patients Must Be Recognised as the Key Stakeholder**
- 7 **Health Information Systems are Vital to Personal Health Care**
- 8 **Health Carers Make Limited and Focussed Use of Patient Data**
- 9 **Data Consolidation is Inherently Risky**
- 10 **Privacy Impact Assessment is Essential**

Specific Criteria

- 1 **The Health Care Sector Must Remain a Federation of Islands**
- 2 **Consolidated Health Records Must Be the Exception not the Norm**
- 3 **Identifiers Must Be at the Level of Individual Applications**
- 4 **Pseudo-Identifiers Must Be Widely-Used**
- 5 **Anonymity and Persistent Pseudonyms Must Be Actively Supported**
- 6 **All Accesses Must Be Subject to Controls**
- 7 **All Accesses of a Sensitive Nature Must Be Monitored**
- 8 **Personal Data Access Must Be Based Primarily on Personal Consent**
- 9 **Additional Authorised Accesses Must Be Subject to Pre- and Post-Controls**
- 10 **Emergency Access Must Be Subject to Post-Controls**
- 11 **Personal Data Quality and Security Must Be Assured**
- 12 **Personal Access and Correction Rights Must Be Clear, and Facilitated**

General Principles

- 1 **Health Care Must Be Universally Accessible.** Access to health care must not be conditional on access to health care data or on demonstration of the person's status (such as residency rights or level of insurance)
- 2 **The Health Care Sector is by its Nature Dispersed.** Health care is provided by thousands of organisations and individual professionals, each with a considerable degree of self-responsibility. The sector is far too large, and far too complex to be centrally planned. Instead it must be managed as a large, complex and highly de-coupled system of autonomous entities, each of which is subject to regulation by law, Standards and Codes
- 3 **Personal Health Care Data is Inherently Sensitive.** Many individuals have serious concerns about the handling of at least some categories of health care data about themselves. Their willingness to divulge important information is important to their health care, but is dependent on them having confidence about how that information will be managed
- 4 **The Primary Purpose of Personal Health Care Data is Personal Health Care.** The protection of the individual person is the primary function of personal health care data and systems that process it. The key users of that data are health care professionals
- 5 **Other Purposes of Personal Health Care Data are Secondary, or Tertiary.** Public health is important, but is a secondary purpose. Administration, insurance, accounting, research, etc. are neither primary nor secondary but tertiary uses. The tail of health and public health administration and research must not be permitted to wag the dog of personal health care
- 6 **Patients Must Be Recognised as the Key Stakeholder.** Government agencies and corporations must directly involve people, at least through representatives of and advocates for their interests, in the analysis, design, construction, integration, testing and implementation of health information systems
- 7 **Health Information Systems are Vital to Personal Health Care.** People want systems to deliver quality of service, but also to be trustworthy, transparent and respectful of their needs and values. In the absence of trust, the quality of data collection will be greatly reduced
- 8 **Health Carers Make Limited and Focussed Use of Patient Data.** Health care professionals do not need or want access to their patients' complete health records, but rather access to small quantities of relevant information of assured quality. This requires effective but controlled interoperability among health care data systems, and effective but controlled communications among health care professionals. Calls for a general-purpose national health record are for the benefit of tertiary users (administration, insurance, accounting, research, etc.), not for the benefit of personal health care
- 9 **Data Consolidation is Inherently Risky.** Physically and even virtually centralised records create serious and unjustified risks. Services can be undermined by single points of failure; health care data isn't universally understandable but depends on context; consolidation produces a 'honey pot' that attracts break-ins and unauthorised secondary uses and creates the additional risk of identity theft; and diseconomies of scale and scope exceed economies
- 10 **Privacy Impact Assessment is Essential.** Proposals relating to personal health care data and health care information systems must be subject to PIA processes, including prior publication of information, consultation with affected people and their representatives and advocates, and publication of the outcomes of the study. Designs for systems and associated business processes must be based on the results of the PIA, and implementations must be rejected if they fail to embody the required features

Specific Criteria

- 1 **The Health Care Sector Must Remain a Federation of Islands.** The health care sector must be conceived as islands that inter-communicate, not as elements of a whole. Health care information systems must be conceived as independent services and supporting databases that inter-operate, not as part of a virtually centralised database managed by the State. Coordinating bodies must negotiate and facilitate inter-operability, not impose central schemes
- 2 **Consolidated Health Records Must Be the Exception not the Norm.** A small proportion of the population may benefit from linkage of data from multiple sources, primarily patients with chronic and/or complex conditions. Those patients must be the subject of consent-based, specific-purpose data consolidation. This activity must not apply to people generally
- 3 **Identifiers Must Be at the Level of Individual Applications.** Each of the large number of dispersed health care information systems must use its own identifier for people. A system-wide or national identifier might serve the needs of tertiary users of personal data, but does little for the primary purpose of personal care, and it creates unnecessary risks for individuals
- 4 **Pseudo-Identifiers Must Be Widely-Used.** Particularly when personal data moves between organisations, the maximum practicable use must be made of one-time-use and other forms of pseudo-identifiers, in order to keep people's identities separate from the data itself, and minimise the risk of personal health care data escaping and being abused
- 5 **Anonymity and Persistent Pseudonyms Must Be Actively Supported.** Anonymity is vital in particular circumstances such as ensuring that people are treated for sexually transmitted diseases. Persistent pseudonyms are vital in particular circumstances such as for protected witnesses, victims of domestic violence, and celebrities and notorieties who have reason to be concerned about such threats as stalking, kidnapping and extortion
- 6 **All Accesses Must Be Subject to Controls.** Access to personal data must be subject to controls commensurate with the circumstances, including the sensitivity of the data and the potential for access and abuse of access. This requires identification of the category of person and in many cases of the individual who accesses the data, and authentication of the category or individual identity. However, the barriers to access and the strength of authentication must balance the important value of personal privacy and effective and efficient access by health care professionals
- 7 **All Accesses of a Sensitive Nature Must Be Monitored.** Non-routine accesses and accesses to particularly sensitive data must be detected, recorded, and subject to analysis, reporting, sanctions and enforcement
- 8 **Personal Data Access Must Be Based Primarily on Personal Consent.** The primary basis for access to personal data is approval by the person concerned. Consent may be express or implied, and may be written, verbal or non-verbal, depending on the circumstances. All accesses based on consent must be detected, recorded and subject to analysis, reporting, investigation, sanctions and enforcement
- 9 **Additional Authorised Accesses Must Be Subject to Pre- and Post-Controls.** All accesses that are not based on personal consent must be the subject of explicit legal authority that has been subject to prior public justification. All such accesses must be detected, recorded and subject to analysis, reporting, investigation, sanctions and enforcement
- 10 **Emergency Access Must Be Subject to Post-Controls.** Health care professionals (but only health care professionals) must have the practical capacity to access data in apparent violation of the personal consent principle, but must only do so where they reasonably believe that it is necessary to prevent harm to some person. All such accesses must be detected, recorded, reported and subject to analysis, investigation, sanctions and enforcement
- 11 **Personal Data Quality and Security Must Be Assured.** Data must be of a quality appropriate to its uses, and retained only as long as it remains relevant. Personal data in storage, in transit, and in use, must be subject to security controls commensurate with its sensitivity, and with the circumstances
- 12 **Personal Access and Correction Rights Must Be Clear, and Facilitated.** Each person must have access to data about themselves, and access must be facilitated by any organisation that holds data that can be associated with them. Where appropriate, the access may be intermediated, in order to avoid misunderstandings and misinterpretation of the data. Where data is not of appropriate quality, the person must be able to achieve corrections to it